Staff Report on Diploma Privilege

Introduction

The Iowa Supreme Court is considering recommendations from The Iowa State Bar Association (ISBA) to adopt a "diploma privilege" for graduates of the University of Iowa College of Law and Drake University Law School. Under the ISBA's recommendations, graduates of the two in-state law schools would automatically be admitted to practice law in the State of Iowa. The recommendations also urge the court to administer the Uniform Bar Examination for all other applicants who must take the bar examination. The ISBA recommendations would retain current character and moral fitness examinations and the related requirement of passage of the Multistate Professional Responsibility Examination (MPRE) for all applicants.

The supreme court has requested staff to supplement the information in the ISBA recommendations, specifically to provide background information on the diploma privilege including its origin, more recent history, and present status in the United States, information on the current status of the Iowa Bar Examination, and information on the Uniform Bar Examination.

I. The Diploma Privilege

At one time or another, thirty-two states and the District of Columbia have recognized some type of diploma privilege. The privilege appears to have developed at a time when both legal education and examinations were in their formative years. The framework of the privilege varied from jurisdiction to jurisdiction, with some states allowing admission only for graduates of public law schools within the state, some allowing it for both graduates of public and private schools, and a few extending the privilege to graduates of law schools in other states where the privilege was permitted.

Iowa had a diploma privilege from 1873 until 1884. Many other states joined Iowa in abandoning the privilege in the late 1800s. It seems that as law school attendance became more common, jurisdictions moved away from informal means of admission to the bar. Today, Wisconsin is the only state maintaining a diploma privilege for law graduates from its in-state law schools.

The jurisdictions to have abolished diploma privileges most recently are Mississippi (1979), Montana (1980), South Dakota (1981), and West Virginia (1986). A brief review of the process of moving away from the diploma privilege

in each of these states is provided below, following a discussion of the evolution of the American Bar Association's position on diploma privilege.

A. American Bar Association

At the turn of the last century, the American Bar Association's Section of Legal Education and Admissions to the Bar (Section) turned its attention to the diploma privilege. Part of the Section's 1899 meeting was devoted to preparing topics for the recently formed Conference of State Law Examiners to address, including whether the bar exam should be written or oral, the form of questions, subjects to be covered, and weighting of covered subjects.

> The meeting of the Section concluded by urging that evidence of good moral character be required of all applicants for admission to the bar. It resolved in 1900 that no law school degree should automatically admit an applicant to the bar and that only a state examination by the State Board of Examiners under authority of the state supreme court should have this power.[1]

The Section formally expressed its disapproval of the privilege in 1905 and again in 1908.[2] In 1921, a special committee of the Section recommended in its report that a resolution be adopted to the following effect:

> The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.[3]

The American Bar Association (ABA) adopted a resolution in 1925 stating that passing a bar examination should be a condition for admission in all jurisdictions. The ABA maintains this position today. Section 16 of the Code of Recommended Standards for Bar Examiners, established by the ABA, the National Conference of Bar Examiners, and the Association of American Law Schools provides:

> 16. Necessity of Written Examination. A person who is not a member of the bar of another jurisdiction of the United States should not be admitted to practice until the person has passed a

> written bar examination administered under terms and conditions equivalent to those applicable to all other applicants for admission to practice. An applicant may also be required to pass a separate examination on the subject of professional responsibility, such as the Multistate Professional Responsibility Examination.

B. Mississippi experience

Mississippi adopted a diploma privilege in 1857. The privilege was granted to graduates of the University of Mississippi Law School, but not the Mississippi College School of Law, which at the time was not an ABA-approved law school. Mississippi College School of Law graduates did not fare well on the bar examination. The young lawyer section of the Mississippi Bar Association adopted a resolution in June 1977 to endorse repeal of the privilege, noting as follows:

> Any diploma privilege contains in itself possibilities for abuse. A diploma privilege removes the decision of quality and number of attorneys who are admitted from the hands of the judicial branch, Board of Bar Admissions, organized bar and all other independent authorities and places these important policy decisions solely in the hands of the administration and faculty of law schools. Whether these law schools are public or private, their goals may be quite different from those of independent agencies such as the courts or the organized bar. The potential for abuse, as well as the principle that everyone admitted to practice law should be judged by a single uniform standard, have been the main reasons that since 1925 the American Bar Association has officially opposed all diploma privileges.[4]

The Mississippi Judicial Council drafted legislation in 1978, which included provisions (1) requiring certain undergraduate work, (2) requiring applicants be from an ABA accredited law school, and (3) requiring all applicants except those admitted by reciprocity to pass the bar exam. In addition, two key provisions in the bill were the transfer of appointment powers for the Board of Bar Examiners from the governor to the supreme court and an

expansion of the size of the board to accommodate testing and grading the higher number of examinees.

House Bill 666 (reforming the bar admissions process) was sent to the Mississippi governor on March 23, 1979. The University of Mississippi's law school dean urged the governor to sign the bill to allow "the upgrading of our bar admissions process so as to provide the finest quality of legal services to the people of Mississippi." Governor Cliff Finch signed the law on April 16, 1979, with a grandfather provision for those enrolled in the University of Mississippi Law School as of November 1981, if they graduated by November 1984.[5]

C. Montana experience

The Montana legislature granted the diploma privilege to graduates of the University of Montana School of Law in 1915. All other applicants for the Montana bar were required to pass a written bar examination.[6] On March 24, 1980, the Montana Supreme Court issued *In the Matter of Proposed Amendments Concerning the Bar Examination and Admission to the Practice of Law in the State of Montana.* Among the matters the court addressed was Question (d): "Should graduates of the University of Montana School of Law and/or graduates of any other law schools approved by the American Bar Association be admitted to practice law in Montana without taking the bar examination?" The court held that the bar examination would be a prerequisite for admission of all law school graduates to the Bar of Montana.[7] The court noted:

> There is no substantial or acceptable argument for retention of the diploma privilege. . . . There is, in fact, a double standard created by the diploma privilege and the Bar examination as it relates to admission to the Bar in Montana. This standard goes beyond the courses offered in the law school and given on the Bar examination. It is the fact that the diploma privileged person enters the job market in June, whereas a Montana resident forced to attend an out-of-state law school must wait until October to take the examination, and in some cases does not pass.[8]

The court also stated, "There is no doubt that the University of Montana School of Law is very good, but concentrating Montana graduates into the Montana Bar becomes dangerously parochial."[9] The court continued:

> The effect of a diploma privilege on the student and on the faculty of a law school that extends the privilege is subtle but sometimes harmful. There exists the possibility of abuse and the standards of the law school may be affected by the fact that nobody really does his best until he has to. Knowing that their students are not to be examined, some professors may be prone not to put forth their best efforts, or at least a better effort than they did the previous year teaching the same course.[10]

The court mentioned with approval statements by former National Conference of Bar Examiner chair E. Marshall Thomas:

> E. Marshall Thomas, the former chairman of the National Conference of Bar Examiners, makes the point that even though all the subjects were the same on the school curriculum and on the bar examination, it would still not be an idle act to require that they take the examination since it serves a real additional purpose. The fact that the law student knows he must face the Bar examination after graduation and before admission to practice is a healthy, educational stimulant. Mr. Thomas further contends that it is also a stimulant to the law school faculty to maintain high standards of legal education because the faculty knows that their students will be examined by state authorities. He says that the Bar examination serves an additional function in that the Bar examination has one essential difference from the law school examination—it is a comprehensive examination covering the entire field of several years of law study.[11]

The Montana Supreme Court concluded that to reach its ultimate goals of establishing the best possible bar admissions system, the diploma privilege must be eliminated. The court did provide a grandfather clause for students then enrolled, effective in 1983.[12]

D. South Dakota experience

The legislature in South Dakota granted a diploma privilege for University of South Dakota graduates in 1903. As early as 1938, a state bar committee on bar admissions recommended abolishing the privilege because they believed it was "unsound in principle."[13] That recommendation was rejected. The South Dakota Supreme Court enacted a rule in 1939 to abolish the privilege effective in September 1948, but then revoked that rule in 1940.

The bar admissions committee again recommended abolition in 1956 and bar members agreed. The supreme court abolished the privilege again, effective December 2, 1957. The privilege was revived in 1973 by court rule. The subject remained so controversial, however, that the supreme court issued a moratorium on further discussions until 1977. South Dakota abolished the diploma privilege in 1981, effective in1983.

E. West Virginia experience

The diploma privilege for graduates of West Virginia Law School began in West Virginia by legislative act in 1897.[14] The West Virginia Supreme Court of Appeals adopted a rule similarly allowing a diploma privilege in 1973.

The West Virginia legislature amended W. Va. Code, 30-2-1 to require all West Virginia law graduates after July 1, 1983, to take the bar examination. The West Virginia Supreme Court of Appeals found the legislative amendment unconstitutionally conflicted with the court's "exclusive authority to regulate admission to the practice of law in this State" in violation of the separation of powers.[15] Subsequent developments in West Virginia rendered the dissent in *Quelch* to be particularly illuminating.

The dissent in *Quelch* noted the opinion's majority failed to provide reasons why the "diploma privilege serves to promote the practice of law."[16] The dissent noted the increasing development of federal regulations, uniform acts, and constitutional decisions impacted all states. "It is sheer myopia to suggest that there is some substantial body of West Virginia law that is different from the general law. Surely, it is not for the uniqueness of our law that we retain the privilege."[17]

The dissent discussed adverse consequences to reciprocity admission for West Virginia diploma privilege admittees. The dissent cited many of the reasons set forth by Montana when it abolished the diploma privilege, including the double standard created by the privilege, the fact a bar exam

motivates law students and professors to maintain high standards, the bar exam's comprehensive coverage of subject matter from several years of law school study, the American Bar Association's clear stance against the diploma privilege, and doubts about the wisdom of ceding to the law school sole responsibility for determining who becomes an attorney.[18]

The abolition of the diploma privilege was discussed at a special meeting of the West Virginia Board of Law Examiners in May 1982. The West Virginia Bar's board of governors submitted a draft of proposed bar admissions rules to the West Virginia Supreme Court on May 31, 1984. The Board of Law Examiners recommended additions and changes to the court on October 17, 1984. The West Virginia Supreme Court of Appeals promulgated admission rule changes effective February 10, 1986. These amendments included the abolition of the diploma privilege effective July 1, 1988. So, although the West Virginia court struck down the legislature's attempt to abolish the diploma privilege, the court soon abolished the privilege on its own.

F. Wisconsin

West Virginia's decision to abandon the diploma privilege left Wisconsin as the only state recognizing a diploma privilege for in-state law school graduates. University of Wisconsin Law School graduates have been admitted by diploma privilege since 1870.[19] The privilege was adopted by the legislature "as an incentive to encourage prospective lawyers to prepare for the profession by a regular course of academic study at the University of Wisconsin law school rather than by apprenticeship or 'reading the law' and then passing a bar exam."[20] From 1897 until 1903, the Wisconsin diploma privilege was expanded to cover any law school of another state or territory that the Wisconsin board of examiners deemed to be accredited as a school of equal standing to the University of Wisconsin's law school.[21] By 1933, the Wisconsin legislature had extended the privilege to Marquette University Law School graduates, and the Wisconsin Supreme Court agreed to that change.

Beginning in 1971, Wisconsin added the thirty- and sixty-credit rules to its diploma privilege requirements. Under these rules, graduates must obtain a grade point average of at least seventy-seven in ten specific courses and achieve the same grade point average on sixty credits chosen from thirty subject areas.[22]

"For states with only a few accredited law schools, the diploma privilege is a terrific system," said Wisconsin Chief Justice Shirley Abrahamson in a 2004 interview. "Wisconsin should not be viewed as the last to retain the diploma privilege; I like to think of Wisconsin as the leader on this issue, not the holdout."[23] Chief Justice Abrahamson also stated, "If there were any indication that graduates from UW or Marquette were less prepared for the practice of law compared with graduates from other schools, we would be the first to look for another system."[24] The Wisconsin Supreme Court continues to stand firmly behind the privilege. In 2010, the court rejected rulemaking petition 09-09, in which about 70 members of the Wisconsin bar sought to either extend the diploma privilege to all ABA-accredited law schools or abolish the privilege.[25]

G. New Hampshire

Nothing further developed regarding the diploma privilege in any other jurisdiction until 2005, when New Hampshire launched the Daniel Webster Scholar Honors Program. The program takes a small-group of handpicked first-year law students at Franklin Pierce Law Center, New Hampshire's only law school, and puts them in a two-year honors program for the students' remaining two years of law school. In the program, students must complete a range of courses, demonstrate professional skills and judgment, compile a portfolio of work, and take comprehensive exams. The curriculum for "Webster Scholars" includes fundamental law school courses, clinic or internship training, and several "practice courses." Webster Scholars will complete more required courses than other students. If they successfully complete the program, they are admitted without taking the two-day New Hampshire bar examination.[26]

II. Current Configuration of the Iowa Bar Examination

A. Introduction

The Iowa Bar Examination is a two-day examination that tests in three different formats, including multiple choice, essay, and performance tests. The examination, accompanied by the character and fitness process, is designed to assure those seeking legal representation in Iowa that licensed attorneys have demonstrated their academic competence and their fitness to practice law. The recent addition of the Basic Skills course gives new Iowa attorneys the

opportunity to learn the nuances of Iowa law, as well as providing tips on Iowa practice and procedure, at the crucial time they are beginning their practice.

B. The exams

Iowa currently uses four tests developed by the National Conference of Bar Examiners (NCBE). The NCBE was founded in 1931 at the suggestion of the ABA's Section on Legal Education and Admission to the Bar. The NCBE's mission is to increase the efficiency of the state boards of bar admissions.[27]

The Multistate Bar Examination (MBE) consists of 200 multiple choice questions that cover constitutional law, contracts, criminal law and procedure, evidence, real property, and torts.

The Multistate Essay Examination (MEE) portion of the test consists of six, thirty-minute essay questions addressing the following potential subject matter areas: corporations and limited liability companies, conflict of laws, constitutional law, contracts, criminal law and procedure, evidence, family law, federal civil procedure, real property, torts, trusts and estates (decedents' estates; trusts and future interests), and Uniform Commercial Code (negotiable instruments and bank deposits and collections; secured transactions). Some questions may include issues in more than one area of law.

The Multistate Performance Test (MPT) consists of two, ninety-minute questions designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each MPT evaluates an examinee's ability to complete a task that a beginning attorney should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to examine six fundamental skills attorneys are expected to demonstrate regardless of the area of law in which the skills arise. Applicants are typically given a library of client interviews, statutes, cases, etc., and are asked to perform a discrete task.

Iowa also requires applicants to pass the Multistate Professional Responsibility Exam (MPRE), which consists of sixty multiple choice questions on attorney ethics.

C. Testing

The Iowa Bar Examination is given in Des Moines in February and July. Dates of state bar examinations are uniform nationwide, except in civil law Louisiana, and the multistate bar examination (MBE) occurs on the last

Wednesday of those months. All states except Louisiana use the MBE as part of their test regime.

Applicants arrive on Monday afternoon for a mandatory orientation and registration. They receive their test ID number at this time, along with a thorough overview of the testing protocol. Testing begins on Tuesday, with two multistate performance tests (MPTs) over a three-hour period in the morning and six essays (MEEs) over a three-hour period in the afternoon. On Wednesday, the applicants take two three-hour MBE sessions of 100 multiple choice questions each. Applicants who transfer or "bank" an MBE score achieved on a prior exam do not participate on Wednesday.

These times may be extended for applicants granted accommodations under the Americans with Disabilities Act (ADA). Applicants with disabilities might also be granted additional accommodations depending on their documented disability.

D. Grading

Grading for the Iowa Bar Examination begins with a general orientation. After orientation, grading teams begin calibration sessions. Each team goes over actual papers until it appears the team members are in sync. The teams then grade the remaining papers. Each question is graded by two graders. Grading is done on a raw score scale of one through six, with one being the lowest and six the highest. The teams also capture benchmark answers (representative examples of a particular score). At all points in the process, there are redundancies to ensure the scores are accurately recorded.

Staff captures the written scores and MBE scores and sends those scores to NCBE for calculation of final scores. NCBE then returns the combined, scaled scores.

E. Automatic Review

Individuals who score between 260 and 265 are placed in the automatic review process. The board members and team leaders each grade the anonymous papers for their question from each applicant in the range. The grades can go up, down, or stay the same on review. Applicants who achieve at least a 266 on review pass the exam and are not told they were part of the review process. Applicants whose reviewed score remains under 266 fail the exam.

F. Performance of our Law Schools on the Iowa Bar Examination

The tables below reflect the pass rates for all in-state law school examinees, including first-time and repeat takers for each Iowa Bar Examination since February 2009. February 2009 marks the first examination when the State of Iowa used the MBE, MEE, and MPT.

Bar Examination Success Rate for In-State Schools

University of Iowa College of Law	Percent of Univ. of Iowa Law examinees passing	Percent of Univ. of Iowa Law first-time takers passing	Percent of Univ. of Iowa Law repeat takers passing
February 2009	83%	92%	25%
July 2009	93%	95%	75%
February 2010	82%	85%	50%
July 2010	94%	94%	100%
February 2011	80%	100%	40%
July 2011	90%	90%	--
February 2012	71%	100%	33%
July 2012	94%	94%	100%
February 2013	87%	92%	50%
July 2013	98%	97%	100%
February 2014	100%	100%	100%

Drake University School of Law	Percent of Drake Univ. Law examinees passing	Percent of Drake Univ. Law first-time takers Passing	Percent of Drake Univ. Law repeat takers passing
February 2009	76%	89%	33%
July 2009	95%	96%	75%
February 2010	82%	100%	25%
July 2010	88%	90%	0%
February 2011	58%	76%	22%
July 2011	87%	92%	42%
February 2012	76%	85%	56%
July 2012	86%	91%	44%
February 2013	74%	90%	45%
July 2013	94%	95%	80%
February 2014	79%	86%	0%

This data reflect that graduates from the two law schools overall do an excellent job on the bar examination, especially the first-time takers.[28]

The ISBA report notes that the bar examination "test of substantive knowledge excludes very few graduates of Iowa's two law schools." The fact that most applicants pass, however, does not mean that all of the in-state graduates do well on the exam. The passing score for the Iowa Bar Examination is a combined, scaled score of 266. In February 2009 (229), July 2009 (222), July 2010 (221), February 2012 (217), and July 2013 (212), the lowest scores on the entire bar examination were posted by in-state graduates. In July 2010 and February 2011, six of the ten lowest scores came from in-state graduates. In February 2012 and July 2012, in-state graduates accounted for seven of the ten lowest scores. Some in-state graduates have taken the exam many times without success.[29]

III. The Uniform Bar Exam

The Uniform Bar Examination (UBE) is administered in jurisdictions that have agreed to give the same exam and allow applicants to transfer complete bar exam scores among participating states. The UBE consists of the Multistate Bar Examination (MBE), the Multistate Performance Test (MPT), and the Multistate Essay Examination (MEE). As in Iowa, the MEE and MPT scores are scaled to the MBE and the tests are weighted as follows: MBE (50%), MEE (30%), and MPT (20%).[30] UBE jurisdictions agree to administer, grade, and score the exams in a uniform manner. Each jurisdiction still sets its own passing score, decides whether to regrade any exams prior to score release, conducts its own character and fitness investigations, and makes its own ADA decisions. Fourteen states have adopted the UBE: Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming.[31]

Iowa currently gives the exact same exams, weights them the same way, and grades the answers using general jurisdictional principles. Until Iowa formally adopts the UBE, however, applicants cannot transfer their scores to another jurisdiction, and those who test in another jurisdiction cannot transfer their UBE score here. If Iowa adopts the UBE, successful examinees will be able to transfer their UBE scores to any UBE jurisdiction where they meet the passing score; and attorneys who pass the UBE elsewhere could be licensed in

Iowa and work for Iowa law firms and corporations without retaking the same examination.

Conclusion

With the exception of the very different New Hampshire honors-based program, no state has adopted the diploma privilege recently. Wisconsin stands alone as a state with a diploma privilege untethered to an honors program. Drake University and the University of Iowa law schools have of course produced many, many graduates who have done admirably on the Iowa Bar Examination and have gone on to great achievements in their professional lives. Yet not all graduates of these schools have fared well on the exam, and some have repeatedly failed to achieve a passing score.

This is by no means a condemnation of Iowa's fine law schools, but it may be an indication that the bar examination does perform a screening function that is not being accomplished elsewhere. With a diploma privilege, an Iowa resident who attended an out-of-state law school would still have to pass the bar examination to be licensed to practice law in Iowa. In addition, there are collateral effects of the diploma privilege that should be considered. Fifteen jurisdictions will not allow reciprocity (admission on motion) for attorneys admitted by diploma privilege. Furthermore, nothing prevents lesser law schools from establishing branches in Iowa to entice students who hope to avoid having to take an examination.

As courts that have abolished the privilege have noted, many people believe bar exams have a desired effect of requiring even passing applicants to synthesize their years of cumulative knowledge and prove their mettle on a comprehensive examination.

Endnotes

[1] Susan K. Boyd, *The ABA's First Section, Assuring a Qualified Bar*, Section of Legal Education and Admissions to the Bar, American Bar Association, at 14 (1993).

[2] *Id.* at 17.

[3] 46 Reports of the American Bar Association 687-88 (1921).

[4] *Final Report, Bar Admissions Study Committee of the Mississippi State Bar Association, 1978-1979, Appendix A.*

[5] *Id.*

[6] George Neff Stevens, *Appendix to "Diploma Privilege, Bar Examination or Open Admission," Memorandum Number 13,* 46 The Bar Examiner 15, 46(3-4), The Bar Examiner, 71–102, 80 (1977).
[7] Montana Supreme Court, *In the Matter of Proposed Amendments Concerning the Bar Examination and Admission to the Practice of Law in the State of Montana*, at 4, Mar. 24, 1980.
[8] *Id.* at 11-12.
[9] *Id.* at 12.
[10] *Id.*
[11] *Id.* at 12-13.
[12] *Id.* at 14.
[13] 7 S. Dak. St. Bar. J. 20-21 (1938).
[14] 1897 W. Va. Acts 50; *see State ex rel. Quelch v. Daugherty*, 306 S.E.2d 233, 238 (W. Va. 1983) (Miller, J., dissenting).
[15] *State ex rel. Quelch v. Daugherty,* 306 S.E.2d 233, 236 (W. Va. 1983).
[16] *Id.* at 238 (Miller, J., dissenting).
[17] *Id.*
[18] *Id.* at 238, 239 (citing *In re Proposed Amendments Concerning the Bar Examination and Admission to the Practice of Law*, 609 P.2d 263 (Mont. 1980)).
[19] Stevens, *supra* note 7, at 89.
[20] Petition to Amend or Repeal Sup. Ct. R. 40-03 (Sept. 25, 2009, p. 1)(Ch. 79, Laws of 1870).
[21] Stevens, *supra* note 7, at 89.
[22] Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 Wis. L. Rev. 645, 648.
[23] *State's Longtime "Diploma Privilege" Challenged*, Wisconsin State Journal, September 13, 2009 (quoting How Appealing, Sept. 13, 2004, howappealing.law.com, Howard J. Bashman).
[24] *Id.*
[25] Wisconsin Supreme Court Annual Statistical Report, 2010-2011 Term.
[26] Linda Dalianis & Sophie Sparrow, *New Hampshire's Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Program*, 24 The Bar Examiner 21 (Nov. 2005).
[27] Susan K. Boyd, *supra* note 1, at 32.
[28] Statistics compiled by the Iowa Board of Law Examiners.
[29] *Id.*
[30] National Conference of Bar Examiners, *The Uniform Bar Examination*, http://www.ncbex.org/about-ncbe-exams/ube/.
[31] *Id.*, http://www.ncbex.org/assets/media_files/Multistate-Tests/2013AdoptionoftheUBE120613.jpg.